No. 83-1653

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SCRIPPS-HOWARD BROADCASTING COMPANY,
Petitioner,

v.

EMBERS SUPPER CLUB, INC.,
Respondent.

On Writ Of Certiorari
To The Supreme Court Of Ohio

REPLY BRIEF OF PETITIONER SCRIPPS-HOWARD BROADCASTING COMPANY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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After the filing of the petition for certiorari in this defamation action, this Court issued its decision in *Bose Corp.* v. *Consumers Union*, 52 U.S.L.W. 4513 (U.S. April 30, 1984) (No. 82-1246). The obvious relevance of *Bose* to the instant litigation, and misstatements of the record contained in the Brief in Opposition of Embers Supper Club, Inc. ("Embers"), persuade petitioner Scripps-Howard Broadcasting Company d/b/a Station WCPO-TV ("the Station") respectfully to submit this Reply Brief.[1]

In light of *Bose*, Embers' contention that "facts proven below" preclude this Court's review in the instant case is plainly in error. *See* Brief in Opposition at 7. On the contrary, *Bose* reinforces the obligation of appellate courts, and especially of

[1] The corporate listing statement required by S. Ct. R. 28.1 and included in the Station's petition remains currently accurate and reference is made thereto.

this Court, to review the record to ensure that the constitutional facts requisite to the imposition of defamation liability have been established. Embers seeks no such scrutiny, but instead a judicial shrug that would leave in place a decision that curtails news coverage of the work of law enforcement officials.

In *Bose*, this Court reaffirmed that, in defamation actions, appellate courts are obliged to undertake " 'an independent examination of the whole record' in order to make sure 'that the judgment does not constitute a forbidden intrusion on the field of free expression.' " 52 U.S.L.W. at 4517 (quoting *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 284-86 (1964)). The requirement of independent appellate review "reflects a deeply held conviction that judges—and particularly members of *this* Court—must exercise such review in order to preserve precious liberties established and ordained by the Constitution." *Id.* at 4520 (emphasis added). Indeed, "judicial evaluation of special facts that have been deemed to have constitutional significance," *id.*, is crucial in order to ensure that finders of fact—including the judges of lower courts—will not purport to impose defamation liability in derogation of the First Amendment rights articulated in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), and other progeny of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).

The First Amendment requires, at the very least, that the plaintiff establish in its case-in-chief, *prima facie*, each of the constitutionally mandated elements of a defamation action set forth in *New York Times* and *Gertz*. Thus, in order to withstand a motion for directed verdict, the plaintiff must establish *facts* demonstrating that:

(a) the statement complained of is defamatory of the plaintiff, *New York Times Co.* v. *Sullivan*, 376 U.S. at 288;

(b) the statement was published with some degree of culpability, *Gertz* v. *Robert Welch, Inc.*, 418 U.S. at 340;

(c) the statement is not substantially true, *New York Times Co.* v. *Sullivan*, 376 U.S. at 279; *Gertz* v. *Robert Welch, Inc.*, 418 U.S. at 341; and

(d) the plaintiff was actually injured as a result of the statement, *Gertz* v. *Robert Welch, Inc.*, 418 U.S. at 349-50.

As this Court's decisions make clear, these facts are of "constitutional significance"; no judgment of defamation liability can stand, consistent with the First Amendment, in their absence.

In the instant case, the four-justice majority of the Ohio Supreme Court failed to ensure that the First Amendment rights articulated in *New York Times* and *Gertz* will be vindicated in this litigation or in other defamation actions instituted in Ohio. Despite the inability of Embers to produce evidence at trial of fault, falsity, actual injury, or of any statement defamatory of Embers, the Ohio Supreme Court simply assumed that a *prima facie* case of defamation had been established. At no stage of a defamation action is the need for independent appellate review of the record in this Court more compelling than upon reversal of a directed verdict against the plaintiff at the close of his case-in-chief. For any rule requiring the defendant, in rebuttal, to demonstrate the *absence* of a *prima facie* case would effectively revive the common-law presumptions of liability so forcefully rejected by this Court in *Gertz*.

In a transparent attempt to mask the Ohio Supreme Court's disregard of this Court's precedents, Embers distorts the record and baldly suggests that the Ohio Supreme Court actually found that the record evidenced a *prima facie* case. On the contrary, the Ohio Supreme Court has ruled that the defendant in an Ohio defamation action is presumed liable, that the plaintiff need only produce evidence of publication, and that the defendant must then prove the absence of the constitutionally mandated elements of actionable defamation—*i.e.*, falsity, fault, actual injury, and a publication "of and concerning" the plaintiff. This approach turns the rule of *Gertz* and *New York Times* on its head. The Station urges that this

Court grant the petition and summarily reverse the judgment of the Ohio Supreme Court, in accordance with S. Ct. R. 23.1.[2]

1. Independent Review Of The Record Reveals That Embers Adduced No Evidence At Trial That The Statements Complained Of Are Defamatory Of Embers.

In *New York Times Co.* v. *Sullivan*, 376 U.S. at 288, this Court held that unless the statements at issue in a defamation action are shown to be defamatory "of and concerning" the plaintiff, the claim is "constitutionally defective." *Accord*, 3 Restatement (Second) of Torts § 564, comment g (1977). In the instant case, an independent review of the record reveals no evidence that either news report at issue was, or possibly could be, understood by any third party as defamatory of Embers. The singular contention of Embers' sole stockholder that his own corporation was defamed—the *only* evidence on the issue presented by Embers—hardly establishes that any third person saw and heard the news reports and considered them defamatory of Embers. Indeed, neither report is in any sense defamatory of Embers, since neither accuses Embers or anyone else of any wrongdoing but rather states that the Embers Supper Club was the *scene* of improper activity. Such news reports do not satisfy the First Amendment mandate of *New York Times* that, to be actionable, the statements complained of must be defamatory of the plaintiff.[3]

Thus, even if the July 21 news report *had* stated, as Embers claims, that "Elmwood Place gamblers" were operating at the Embers Supper Club, it would not be defamatory of Embers.[4]

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[2] To expedite an independent review of the record in this Court, the Station has requested that the record below be certified and made available to the Court pursuant to S.Ct. R. 19.1.

[3] *Accord*, El Meson Espanol v. NYM Corp., 521 F.2d 737 (2d Cir. 1975); Gwinn v. Washington Post Co., 211 F.2d 641 (D.C. Cir. 1954) (per curiam).

[4] Contrary to Embers' contentions, the July 21 news report does *not* charge that Elmwood Place gamblers had set up operations at the Embers Supper Club. That report states, in its entirety:

> Springdale Police raided the Embers Supp[er] Club, on Northland Boulevard, this afternoon, and seized racing forms, betting slips, and

Moreover, Embers' assertion that the July 23 news report "charged the Embers with being an area bookie" simply abandons credulity. Brief in Opposition at 5.[5] This tortured reading of plain English, which was rejected by even the Ohio Supreme Court, can hardly serve to support Embers' claims.

Because of their lack of defamatory reference to Embers, each news report at issue "fits easily within the breathing space that gives life to the First Amendment." *Bose Corp.* v. *Consumers Union*, 52 U.S.L.W. at 4521. The cavalier disregard of this constitutional mandate by four justices of the

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> other gambling paraphrenalia [sic]. *Police said they acted on a tip*, that handbook operators from Elmwood Place h[ad] set up operations there. So far, no arre[sts] have been made; the Club itself remains open.

Record, Embers Supper Club, Inc. v. Scripps-Howard Broadcasting Co., No. 83-102, at 578 (Ohio Jan. 11, 1984) [hereinafter cited as R.] (emphasis added). Embers produced *no* evidence that police did not say they acted on such a tip, and in fact Embers' own evidence demonstrates that police *were* told, as Embers' sole shareholder admitted at trial, that if the "bookie at the Embers" failed to pay his gambling debts, three men would "blow the place up." R. 373-75, 592. Plainly, the Ohio Supreme Court's decision, if not reversed, will loom as an imposing disincentive to news organizations that might otherwise seek to inform the public of the bases upon which law enforcement authorities undertake raids, searches, arrests, and other official actions premised upon a prior showing of probable cause. The prospect of such silence, such self-censorship, cannot augur well for either the deterrence of crime or the comprehensibility of a society ordered by law.

[5] Embers understandably disregards the text of the July 23 news report, which states:

> Business went sour for some of the area's bookies . . . in Elmwood police seized one man doing business on foot, another operating out of a restaurant on Vine Street. And, in Springdale, the Embers Club was raided, and police seized bettings [sic] slips and equipment.

R. 580. Embers now asserts that its "expert" witness at trial, Jon Hughes, testified that the sentence, "Business went sour for some of the area's bookies," is a "lead sentence" which necessarily refers to Embers. Brief in Opposition at 5. Of course, expert testimony on the ordinary meaning of language in a news report is improper, because the ordinary meaning of language is not beyond the comprehension of laymen. Expert testimony on this question is inadmissible. United States v. Brown, 501 F.2d 146, 148-50 (9th Cir. 1974), *rev'd on other grounds sub nom.* United States v. Nobles, 422 U.S. 225 (1975); State v. Thomas, 66 Ohio St.2d 518, 423 N.E.2d 137 (1981).

Ohio Supreme Court alone warrants summary reversal of its judgment.

2. Independent Review Of The Record Reveals That Embers Adduced No Evidence At Trial That The News Reports At Issue Are Not Substantially Accurate.

This Court's decisions make clear that the First Amendment forbids the imposition of defamation liability for publication of truth. *See, e.g., Gertz* v. *Robert Welch, Inc.*, 418 U.S. at 340-41; *New York Times Co.* v. *Sullivan*, 376 U.S. at 271-79. By refusing to require Embers to produce evidence of falsity in its case-in-chief, the Ohio Supreme Court has reinstated the common law rule of presumed falsity—a rule that this Court has squarely repudiated. Embers must resort to gross distortions of the record in order to claim falsity in *post hoc* justification of the Ohio Supreme Court's decision. Its claim that "[n]o gambling operations of any type were being conducted on the premises," Brief in Opposition at 4, is an outright fiction that cannot overcome the reality of the record below. Daniel Comer, Embers' sole stockholder, himself *admitted* at trial that he often had placed illegal bets, and that he would have the Embers' "cook" place bets for him. R. 395-400. Comer further admitted at trial that he had been told by a customer, as had the police, that if the "bookie at the Embers" did not pay off his gambling debts, three men would "blow the place up." R. 373-75, 592. Comer admitted that he "knew of the bookmaking activities," R. 592, but had told the customer "not to worry about it," R. 375. Moreover, it is undisputed that the raid had in fact occurred and that gambling equipment had in fact been seized by police at the Club. And, while there was testimony that no employees of Embers actually lived in Elmwood Place, there is *no* evidence that Elmwood Place gamblers had *not* set up operations at the Club. R. 368-10.

On this record, Embers' contentions of falsity constitute a contrivance which, if given the imprimatur of the Ohio Su-

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Moreover, contrary to Embers' assertion, there is not a shred of evidence that the Station's employees "admitted the correctness" of the so-called "expert's opinion." Brief in Opposition at 5.

preme Court and this Court, can only serve to punish the Station for accurately informing the public about the probable cause for a police raid.

3. Independent Review Of The Record Reveals That Embers Adduced No Evidence At Trial That It Suffered Actual Injury To Reputation As A Proximate Result Of Any Allegedly Defamatory Statement.

This Court's decision in *Gertz* precludes defamation liability unless the plaintiff demonstrates that it sustained "actual injury" as a result of the statements at issue. 418 U.S. at 349. This "constitutional command of the First Amendment" requires that *any* award of damages for defamation "must be supported by competent evidence concerning the injury." *Id.* at 349-50. An independent review of the record reveals that the trial court acted properly in striking Embers' conjectures as to damages on the ground that they were too speculative to go to the jury. Not only is there no credible evidence of any decline in Embers' business due to the news reports, but the raid itself—and the admitted knowledge of Embers' customers that the place would be "blown up" if Embers' "bookie" did not pay his gambling debts—were plainly the cause of any possible business misfortune suffered by Embers. The First Amendment prohibits presumed damages, and the decision of the Ohio Supreme Court should be summarily reversed on this ground as well.

4. Independent Review Of The Record Reveals That Embers Adduced No Evidence At Trial That The News Reports At Issue Were Published With Any Degree Of Culpability.

In *Bose*, this Court confirmed that independent appellate review is necessary in order to ensure that liability for defamation is limited "to instances where some degree of culpability is present." 52 U.S.L.W. at 4521. This limitation is crucial "in order to eliminate the risk of undue self-censorship and the suppression of truthful material." *Id.* In the instant case, Embers failed to demonstrate at trial that the Station was at fault in any sense in broadcasting the news reports at issue. As an independent review readily reveals, there is *no* evidence in the

record that either news report was prepared in derogation of accepted standards of journalism as practiced every day by professional broadcasters, including employees of the Station. By ignoring this crucial omission in Embers' *prima facie* case, and requiring the Station to prove the absence of fault, the Ohio Supreme Court has violated the command of the First Amendment articulated in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. at 340.

Indeed, Embers' failure to produce evidence of fault resulted from Embers' own tactical decision at trial to decline to call relevant witnesses. Embers had over nine years to prepare for trial, and it could easily have called police officials, as witnesses on its behalf, to testify, if they could, that no Station employee verified with police the reported raid at the Club. Similarly, Embers could have called the Station employee responsible for monitoring the police radio and gathering the information contained in the news reports at issue to testify, if he could, that he did not contact the police and that the police did not refer to Elmwood Place in their report of the raid. Embers deliberately chose neither of these strategies and the record is, accordingly, wholly devoid of evidence of fault. Indeed, under the Ohio Supreme Court's approach, Embers may well have had a *stronger* case of fault had it elicited *no* testimony at all on the issue.[6]

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[6] Embers continues to assert that the Station was somehow at fault in not contacting an employee of Embers prior to the broadcasts. This contention is absurd. There was no need to contact anyone at Embers because neither Embers nor anyone else was accused in the news reports at issue of engaging in any wrongful conduct—or, for that matter, of engaging in any type of conduct at all. *See* Gertz v. Robert Welch, Inc., 418 U.S. at 348. Indeed, Embers' penchant for misstatement conveniently ignores its own failure to contact the Station after either of the broadcasts seeking correction, clarification, or retraction of the news reports. Embers also claims that the first sentence of the July 23 report, "Business went sour for area bookies," was "a product of the author's imagination." Brief in Opposition at 5-6. The record, however, is clear that these were words of Embers' counsel, not of the witness, who actually testified, "I don't like the connotation of 'imagination.' " R. 63. The witness's clarification is understandable, for *every* communication is, to some extent, a "product of the author's imagination." This hardly means that the communication is a total fabrication, in the sense this

CONCLUSION

The news reports at issue did no more than accurately inform the public about law enforcement activity. As such, they epitomize one of the most commonplace services provided by local television news. By failing to require the defamation plaintiff to establish a *prima facie* case, the Ohio Supreme Court's decision erects for Ohio news media a formidable obstacle to reporting on law enforcement activity. If a community television station must bear the burden—through years of costly litigation—of a defamation plaintiff's own inability to establish a *prima facie* case, it often will choose simply to omit or truncate coverage of criminal investigations and law enforcement. It is precisely for this reason that *Gertz* and *New York Times* require the defamation plaintiff—surely no less than any other tort plaintiff—to prove its case at trial, *prima facie*, before the defendant need go forward. After the plaintiff has had every opportunity to obtain proof and to produce it at trial, but has failed to do so, the case must be weeded out as meritless. The First Amendment's requirement that a defamation plaintiff prove its case—by producing *evidence* of fault, falsity, actual injury, and defamatory reference to the plaintiff—demands no less.

Respectfully submitted,

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Court employed counsel's phrase in *St. Amant v. Thompson*, 390 U.S. 727 (1968). A journalist's use of plain English to report accurately such matters as police raids and gambling arrests does *not* evince a "high degree of awareness of probable falsity." *Id.* at 731.